To: Tommy Hoyt, Chair, MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group
From: Richard Cram
Re: Memorandum re Prioritized Issues List—Issues No. 12-13
Date: October 7, 2019

This memorandum provides questions raised by and information concerning Issues No. 12 and 13 from the "baker's dozen" Prioritized Issues List below. The MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group is tasked with addressing that list of issues. The work group will prepare a "white paper" concerning those issues for consideration by the Uniformity Committee. The work group discussed Issues No. 1 through 4 during the August 29, 2019 teleconference meeting and Issues No. 5 and 6 during the September 19, 2019 teleconference meeting. Issues No. 7 through 11 were discussed during the teleconference meeting of the work group on October 4, 2019. Memoranda concerning those issues can be downloaded from the MTC website at www.mtc.gov from the agenda page for this work group. During the upcoming teleconference meeting scheduled for October 10, 2019 at 1pm EDT, the work group will focus on Issues No. 12 and 13.

Prioritized Issues List:

1. **Definition of marketplace facilitator/provider**
2. **Who is the retailer?**
3. **Remote seller and marketplace seller vs. marketplace facilitator/provider recordkeeping, audit exposure and liability protection**
4. **Marketplace seller-marketplace facilitator/provider information requirements**
5. **Collection responsibility determination**
6. **Marketplace seller economic nexus threshold calculation**
7. **Remote Seller sales/use tax economic nexus threshold issues**
8. **Certification requirement**
9. **Information sharing**
10. **Taxability determination**
11. **Return simplification**
12. **Foreign sellers**
13. **Local sales/use taxes**

Questions and Information Concerning Issues No. 12-13

12. Foreign sellers

Should states publish clear guidance for foreign sellers with economic nexus needing to register to collect?

Foreign sellers are subject to states' sales/use tax laws, although U.S. treaties may protect them from income taxes. One barrier that foreign sellers encountering in attempting to register with states for sales/use tax encounter is their lack of an FEIN. States will need to have a process for registering foreign sellers or marketplaces when such entities may lack an FEIN. States need to provide guidance to foreign sellers and marketplaces on their registration procedures.

Should states develop enforcement strategies concerning noncompliant foreign sellers?

Brian Hamer, MTC Senior Counsel, recently provided the following information to the Uniformity Committee regarding enforcement of state tax judgments against foreign sellers (see PowerPoint presentation at November 7, 2018 meeting in Orlando, FL, in the Uniformity Committee archives at www.mtc.gov):

"The Revenue Rule" provides: "No country ever takes notice of the revenue laws of another." *Holmes v. Johnson*, 98 Eng. Rep. 1120, 1121 (1775). The U.S. Supreme Court continues to acknowledge the revenue rule, most recently in *Pasquantino v. United States*, 544 U.S. 349 2005.

Generally, U.S. tax treaties do not address enforcement of foreign tax judgments. Tax treaties primarily concern income and capital taxes. Brian suggested the following tools to achieve tax compliance from foreign sellers:
1. Many foreign sellers sell to U.S. customers through marketplaces. States can impose tax collection responsibilities on marketplaces.
2. Obtain purchase data from the U.S. Customs Bureau and (if the state imposes an individual income tax) deduct unpaid use taxes from state income tax refunds.
3. Avoid application of the revenue rule by pursuing non-tax civil actions against sellers that collect but do not remit use taxes.
4. Impose Colorado-style reporting requirements on sellers that do not collect and remit tax. Impose penalties on those sellers that do not comply.
5. Levy credit card and similar payment receipts in the possession of U.S. entities that provide payment processing services to foreign sellers.

Word of Caution: When devising tools to address non-compliance by foreign sellers, states must be careful not to discriminate against foreign commerce. If a state imposes requirements that are different from the requirements that are imposed on domestic sellers, it must be prepared to identify a compelling local interest and to show that there is no less discriminatory way to achieve that result.

13. Local sales/use taxes

Collection of local sales/use taxes adds a layer of complexity to tax compliance for remote sellers and marketplaces. What measures could states adopt to simplify some of that complexity?

States that are members of the Streamlined Sales and Use Tax Agreement (SSUTA) were required to adopt the following simplification/uniformity features into their sales tax laws concerning local sales tax administration:

State-level administration of local sales/use taxes;

Uniform state vs. local tax base (with a few exceptions);

Provision of databases for local rates and boundaries;

Time limitations and notice requirements for local rate and boundary changes; and

Destination sourcing.

Non-Streamlined Sales Tax states may or may not have included some of these simplification features in their sales/use tax administration laws.

In some states, local jurisdictions have "home rule" authority concerning the ability to impose and administer local sales/use taxes. Local sales tax administration may not be centralized at the state level. The state and local tax bases may differ. A remote seller could be required to register and file returns both at the state and local levels. There could be questions about whether the local jurisdiction is seeking to apply economic nexus at the local jurisdiction level.

Some states have undertaken efforts to simplify administration of their local sales/use taxes for remote sellers.

Alabama has adopted the ALABAMA SIMPLIFIED SELLERS USE TAX REMITTANCE PROGRAM under its Reg 810-6-2-90.02. The program provides that the remote seller can collect and remit a flat 8% combined state and local use tax rate. The remote seller receives 2% discount as compensation. The purchaser can claim a refund from the Department for the difference between a lower local sales tax rate and the local portion of the flat combined rate. There is a statutory formula for sharing the revenue among local taxing jurisdictions (which administer their own local sales taxes, unless they have agreed to have the state administer them).

Louisiana and Texas have adopted programs somewhat similar to Alabama's.

Sourcing becomes an issue in those states enacting economic nexus for sales/use tax but applying origin sourcing to intrastate sales. The remote sales will be destination sourced. In those states, given the same purchaser, the local rate collected by an in-state seller may differ from the local rate collected by the remote seller sourcing the sale to the purchaser's delivery address.

In *ASSOCIATED INDUSTRIES V. LOHMAN*, 511 U.S. 641 (1994), Missouri's statewide "additional use tax" (1.5%) on goods purchased outside the state and stored, used, or consumed within the state was purportedly designed to "compensate" for the taxes imposed by local jurisdictions within the state on in-state sales of goods. The local sales tax rates varied widely, and in many jurisdictions the "additional use tax" rate exceeded the local sales tax rate (ranging from 0-3.5%). The U.S. Supreme Court held that this scheme was an unconstitutional discrimination against interstate commerce in local jurisdictions with local sales tax rates below the statewide "additional use tax" rate.

Adoption of destination sourcing for both intrastate and interstate sales is a solution to the *Associated Industries* problem. As part of their sales/use tax economic nexus legislation, Colorado and New Mexico are phasing in adoption of destination sourcing for intrastate sales.